88-320

No.

Supreme Court, U.S.
FILED
AUG 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS ROBERT KAMMER,

Appellant,

v.

CHRISTINE J. YOUNG,

Appellee.

ON APPEAL FROM THE
COURT OF SPECIAL APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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a. **Question Presented**

Did the admission into evidence at trial that the "statistical probability" of appellant's paternity was "99.78%", as permitted by the Maryland Code, Family Law Article, section 5-1029, violate appellant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution?

b. **List of all Parties to the Proceeding**

1. Thomas Robert Kammer, appellant
2. Christine J. Young, appellee

c. **Table of Contents and Authorities**

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d. **Reference to Prior Opinions**

June 9, 1983 - Opinion of the Circuit Court for Baltimore City excluding the blood test evidence at the trial of this case.

March 5, 1984 - Opinion of the Circuit Court for Baltimore City permitting introduction of the blood test evidence at trial.

April 4, 1986 - Entry of "Decree Determining Paternity" by the Circuit Court for Baltimore City.

May 7, 1986 - Entry of "Modified Paternity Decree" by the Circuit Court for Baltimore City.

January 13, 1988 - Opinion of the Court of Special Appeals of Maryland affirming the judgments of the Circuit Court for Baltimore City, dated April 4, 1986 and May 7, 1986, reported at 78 Md.App. 565, 535 A.2d 936 (1988).

February 16, 1988 - Issuance of the Mandate of the Court of Special

Appeals of Maryland.

May 31, 1988 - Order of the Court of Appeals of Maryland denying Petition for Writ of Certiorari.

e. Jurisdictional Grounds

Appellant seeks review of the paternity judgments of the Circuit Court for Baltimore City dated April 4, 1986 and May 7, 1986 which judgments were affirmed by the Court of Special Appeals of Maryland on January 13, 1988, further review being denied by the Court of Appeals of Maryland by order dated May 31, 1988. A Notice of Appeal to this Court was filed by appellant in the Court of Special Appeals of Maryland and with the Circuit Court for Baltimore City on August 12, 1988. Review is proper pursuant to the provisions of 28 U.S.C. Section 1257(2) on the ground that evidence entered against appellant at trial,

as permitted by the Maryland Code, Family Law Article, Section 5-1029, violates due process of law and accordingly is repugnant to the Constitution of the United States, as amended.

f. Applicable Constitutional Provisions and Statutes

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution,

Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Code, Family Law Article

Section 5-1029:

> (a) In general. - On the motion a party to the proceeding or on its own motion, the court shall order the mother, child, and alleged father to submit to blood tests to determine whether the alleged father can be excluded as being the father of the child.
> (b) Approved laboratory required. - The blood tests shall be made in a laboratory selected by the court from a list of laboratories provided by the Administration.
> (c) Form of results. - The labor-

atory shall report the results of each blood test in writing and in the form the court requires.

(d) Copies of results. - A copy of the results of each blood test shall be provided to the parties or their counsel in the manner that the court directs.

(e) Results as evidence. - (1) The results of each blood test shall be received in evidence if: (i) definite exclusion is established; or (ii) the testing is sufficiently extensive to exclude 97.3% of alleged fathers who are not biological fathers, and the statistical probability of the alleged father's paternity is at least 97.3%.

(2) A laboratory report is prima facie evidence of the results of a blood test.

(3) If a laboratory report is admitted in evidence, the laboratory technician who made the test is subject to cross-examination by any party to the proceeding.

g. **Statement of the Case**

This case involves an allegation of paternity by appellee, Christine J. Young. Appellee instituted paternity proceedings in the Circuit Court for Baltimore City (hereinafter referred to

as "the Circuit Court") seeking a determination that appellant was the father of a child born to appellee on May 24, 1982 and also requesting an order requiring appellant to pay child support pursuant to that determination.

Maryland's paternity statute permits the inclusionary results of blood tests to be admitted into evidence against a putative father in a paternity case provided that the "statistical probability of the alleged father's paternity is at least 97.3%". Prior to trial on the merits in this case, the Circuit Court entered an order requiring the parties, and the minor child, to submit to a blood test pursuant to the provisions of the Maryland statute set forth above. The laboratory performing the test interpreted the same and produced a written report dated November 12, 1982 stating that the "plausibility of

[appellant's] paternity = 99.78%" [see Apx. 102-103].

Prior to trial, appellant filed a "Motion for Pretrial Determination of Admissibility of Blood Tests" which sought the exclusion of the blood test interpretation at trial. After a three-day evidentiary hearing, that motion was granted [see Apx. 1, ruling of Judge J. Owen Wise dated June 9, 1983]. Pretrial proceedings established that the laboratory interpretation of the blood test evidence utilized "Bayes' Theorem", a formula of probability theory which is used to combine quantitative medical evidence with all other non-medical evidence in the case to deduce one overall probability of paternity. See Ellman and Kaye, Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?,

54 N.Y.U.L.Rev. 1131 (1979).[1] In order to establish a scientifically valid "statistical probability of paternity", it is necessary to have both the "posterior probability" and the "prior probability" in order to make the necessary computations pursuant to the formula. The raw blood test data constitutes the "posterior probability". However, the non-genetic evidence, i.e., the chance that the defendant is really the father, is obviously unknown to the laboratory. The laboratory has no accurate data upon which to ascertain the "prior probability" that the alleged father is, in fact, the actual father. Accordingly, blood testing laboratories routinely utilize and incorporate an assumed "prior

---

[1] Counsel respectfully submits that the reading of this well researched article is essential for a full understanding of the statistical theory and the legal issues raised by this case.

probability" of one-half or .5 into the equation called for by Bayes' Theorem. As Ellman and Kaye, supra, note:

> Since Bayes' Theorem is the accepted mathematical technique for calculating conditional probabilities, it is not surprising that it has been employed by experts testifying in recent paternity disputes. It is surprising, however, that the currently accepted technique allows the expert to make his own undisclosed estimate of the prior probability in order to arrive at the probability of paternity he presents to the jury. For instance, the expert who testified for the prosecution in Cramer v. Morrison [88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979)] routinely calculates his "probability of paternity" by assuming that the non-test evidence establishes a 50% chance that the defendant is the father [citation omitted]. This is the equivalent to supposing that the universe of possible fathers is already reduced to two equally likely suspects before considering the HLA test results. As the application of Bayes' Theorem shows, making such an assumption insures that in every

> case in which any recognized blood test does not exclude the defendant, one will find that he is probably the father, thus satisfying the burden of proof in civil cases [citation omitted]. It is apparent from the court's opinion in Cramer that it did not understand that such an assumption had been made [citation omitted], nor have other courts displayed an awareness on this point.
>
> There seems to be no basis for the blanket assumption that the prior probability is one-half. 54 N.Y.U.L.Rev. 1131, 1149-1150.

Petitioner submits that the unwarranted assumption of the "prior probability" in Bayes' Theorem, utilized by the blood test laboratory in this case, was an essential predicate upon which the trial court judge initially suppressed the result.

When the case was initially called for trial, the Circuit Court (Judge Joseph H. H. Kaplan) indicated an intention to reconsider the earlier ruling

suppressing the test. After further pretrial proceedings, appellant filed a "Supplemental Motion for Pretrial Determination of Blood Tests and for Other Appropriate Relief" arguing that the admission of the interpretation of the blood test results, before a jury, which was predicated upon the assumed prior probability and which represented that appellant's "probability of paternity" as "99.78%", offended due process of law and denied a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Appellant's Supplemental Motion was denied and the Circuit Court ruled that the blood test interpretation would be admissible at appellant's trial.

At trial, appellant objected to the introduction of the blood test and its interpretation before the jury:

THE COURT: I read the file.

I told you I would and I did. I read the entire proceedings of this case other than the entire testimony before Judge Wise because it's 200 pages, but I read the pertinent parts of that testimony which was germane to the issue as to the admissibility of the results of the laboratory test, the blood test.

MR. BARNES: Right.

THE COURT: Now, what you want me to do now I assume is to rule on the same subject matter before it gets before the jury.

MR. BARNES: Not exactly.

* * *

MR. BARNES: I want to be clear.

THE COURT: Be very clear.

MR. BARNES: Number one, I have raised the point to you that if this test comes in we may as well forget it because the test number overwhelms the jury and violates fundamental fairness, due process of law under Article 23 and Article 24 of the Maryland Declaration of Rights and the Fifth and Fourteenth Amendments of the United States Constitution. It is written about in the literature that counsel has even put in as evidence before the Court in this case that it has consti-

tutional problems.

I say to admit this test, irrespective of compliance with the statute, violates the constitutional rights of the defendant in this case and I move to exclude it now.

THE COURT: Uh-huh.

* * *

MR. BARNES: I'm talking about two different planes. The Constitutional argument I am making--

THE COURT: I understand that but I am not going to rehash the constitutional argument because you did that before Judge Kaplan. What I am saying is will you agree that the blood testing procedures set forth in the statute are admissible, the procedures?

MR. BARNES: I am saying not under constitutional basis.

THE COURT: You are saying it is not admissible. Is that what you are telling me?

MR. BARNES: Yes, sir.

THE COURT: I don't agree with that. I do not agree with that. I think it is admissible without any question.

* * *

MR. MOSS: Okay. At this time I will offer the blood test into evidence as petitioner's exhibit 6.

MR. BARNES: Okay, and I object on all the grounds previously cited to the Court.

THE COURT: Overruled. Put it in.

* * *

Both in the pre-trial proceedings, and at trial, appellant called Gary A. Chase, Ph.D. as a witness concerning the statistical interpretation of the blood test results performed by the laboratory. Dr. Chase has been employed by Johns Hopkins University for seventeen years and he is presently an associate professor at the Johns Hopkins University School of Hygiene and Public Health and at the School of Medicine. Dr. Chase was a national merit scholar, a magnum cum laude graduate of Harvard University with

a degree in biochemical sciences and a minor in mathematics. He received a Ph.D. in probability and statistics from Johns Hopkins University in 1970. Dr. Chase has had extensive exposure to statistical genetics in his post-doctorate work at Hopkins and he has also been president of the Maryland Chapter of the American Statistics Association. He was an investigator in genetic statistics sponsored by the Howard Hughes Medical Institute from 1973 to 1977 and had National Institute of Health pre-doctoral and post-doctoral fellowships in the subject of human genetics. His curriculum vitae reflects an extensive bibliography with over fifty articles published regarding human genetics, including articles on the HLA system and the interpretation of data which is derived therefrom. The trial court qualified the doctor as an expert in statistics and

probability, statistical methods in human genetics and the interpretation of evidence from paternity testing.

In both the pre-trial and trial proceedings before the Circuit Court, Dr. Chase emphasized that the appellee's blood test report, and corresponding testimony in support thereof, did not state a "statistical probability of paternity". He contradicted "very strongly" the lab technician's testimony that the assumed prior probability of .5 was "neutral" - an assumption which Dr. Chase characterized as a "highly prejudicial assumption to the defendant" and "an example of how science can be used to hurt people". Dr. Chase testified that the methodology of using an assumed prior probability is not accepted by the scientists in the field of probability and statistics and that the only community accepting this approach is the community

of blood banking and paternity testing people - those who generally do not hold any degrees from institutions of higher learning and do not have any training, education or experience in the advanced fields of probability and statistics.

In the pre-trial suppression hearing, Mrs. Margaret Brooks, one of the laboratory technicians offered as a witness by appellee, testified as follows:

> Q - Mrs. Brooks, you know what a hypothetical question is?
>
> A - I think so.
>
> Q - Alright. I'm going to ask you one. If the accused father was in prison or known by absolutely uncontroverted fact to be isolated from the plaintiff-petitioner, the mother, during the relevant period of time in which she conceived the child that would be the subject of the paternity dispute, would you still use a prior probability of 0.5?

A - No. If someone asked me to calculate a prior probability giving me that information specifically, it would be possible to alter the prior probability incorporated in the equation.

Q - But without investigation you would use 0.5 would you not?

A - Without investigation, I would use 0.5 because it is a neutral prior probability.

Q - And therefore the accused father who was in prison or known of uncontroverted fact by some other means other than your blood test could be found by your test to be the father, could he not?

* * *

THE COURT: Given the hypothetical, the man could still be determiend to be the father?

THE WITNESS: Oh, could be? Yes, he could be.

* * *

At trial, appellee's counsel, again and again, paraded large charts and exhibits emphasizing to the jury that the

"statistical probability" of appellant's paternity was "99.78%".

Appellant testified at trial in his own defense that he had not had sexual relations with the appellee during the month which she became pregnant (August, 1981) or, for that matter, at any time after December, 1980.[2] Appellee offered no evidence that petitioner had ever admitted that he was the father of the child or had admitted to having sexual relations with the appellee during the period in which she became pregnant.

In addition to appellant's vehement denial of sexual relations with appellee, and of his paternity, there was additional evidence in the case that appellee had had a suspicious relationship with another adult male (Klouser) at the time

---

[2] Based upon appellant's testimony, the "prior probability" of his paternity would be zero.

that she became pregnant. The trial court refused to admit evidence that Klouser, who was deceased at the time of trial, told appellant's sister that he had had a sexual relationship with the appellee in August, 1981 and stated that he could have easily been the father of appellee's child.

At the conclusion of the evidence at trial, the trial court instructed the jury that the blood test results were admissible if "the statistical probability of the alleged father's paternity is at least 97.3%" and that "a laboratory report is prima facie evidence of results of a blood test". The jury determined that the appellant was the father of appellee's child and the court entered judgments on those verdicts. (See Apx. 44 and Apx. 46).

Appellant entered an appeal to the Court of Special Appeals of Maryland,

arguing, among other issues, that the introduction of the interpretation of the blood test evidence violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution. That court affirmed the judgment finding that no constitutional violations had occurred. (Apx. 51). Appellant filed a petition for a Writ of Certiorari to the Court of Appeals of Maryland raising the issue as to whether the introduction of the test results violated his rights to due process of law and to the right to trial by jury. That court denied the petition. (Apx. 98).

h. **Argument in Support of Plenary Consideration**

Appellant has been wrongly determined to be the father of appellee's child, notwithstanding the opinions of laboratory technicians that the "statis-

tical probability" of his paternity is "99.78%". It is undeniable that the pronouncement of such a high "statistical probability" is compelling, particularly to those laymen, lawyers and judges unsophisticated in the field of probability and statistics. However, if this Court were to permit full briefing and oral argument, the record would show the illusory nature of the blood test evidence offered against Mr. Kammer.

Appellant submits that the aura of authenticity and reliability emanated by the statistical pronouncement of appellant's alleged paternity seems to have prevented the lower courts from fairly evaluating both the veracity of the statistical methodology used and the prejudicial impact of that methodology on appellant. The courts below, in essence, have ruled that <u>it doesn't matter</u> that

the scientific theory utilized by the blood test laboratory has been misapplied or that it is not accepted by the relevant scientific community of genetic biostatisticians. The Maryland courts have found the procedures of the laboratory acceptable, under the guise of statutory construction, because the Maryland legislature heard only from representatives of the "blood banking" community. Full briefs and argument would disclose that the "blood bankers" are not scientists, but rather technicians, lacking formal education, experience and understanding in the field of probability and statistics. Current scientific knowledge and practice does not approve of the use of Bayes' Theorem in establishing a "probability of paternity". In their effort to uphold the Maryland statute, and the judgment rendered against appellant in this case,

the courts below have refused to accept the scientists' admonitions on this issue and have instead deferred to the "scientific community" of lab technicians. Such refusal has judicially ordained a scientifically invalid procedure, thereby permitting the use of unreliable and highly prejudicial evidence against appellant. The evidence is uncontradicted that an innocent father can be determined to have a "statistical probability" of paternity of "99.78%" - a proposition which appellant finds absurd in the extreme.

Even assuming that this Court accepts the use of an assumed fact in the use of Bayes' Theorem, appellant asserts that the introduction of statistical evidence at the trial of his case was sufficiently egregious as to constitute a violation of his rights to due process of law under the Fifth and Fourteenth Amend-

ments to the United States Constitution. Fundamental fairness demands the exclusion of inflammatory or highly prejudicial presentations of evidence before the factfinder. The lower courts in Maryland have shown no concern whatsoever with the exaggerated impact upon the jury of the statistical claims concerning the "probability" of appellant's paternity. Given the traditional concern about the exaggerated impact of statistical evidence on a jury, it is significant to note the complete absence of consideration given to an alternate, but less prejudicial, means of proof regarding the blood test evidence.

There is a dearth of case law on the issue as to whether the use of statistical probabilities in a trial constitutes a violation of due process of law. However, due to the growing practice of the use of such probabilities, and Bayes'

Theorem, it would certainly be appropriate and in the public interest for this Court to fully review this matter.

Counsel has not located any cases decided by this Court approving the use of statistical probabilities in the assessment of a party's liability or guilt. The few reported cases in this area have rejected the attempt to present statistical probabilities or other statistical conclusions on the ultimate issue before the jury. A leading case is People v. Collins, 66 Cal.Rptr. 497, 438 P.2d 33 (1968) in which the Supreme Court of California reversed a robbery conviction for improper use of statistical evidence. In Collins, as here, the expert statistical witness assumed a fact not in evidence. The Supreme Court of California found that the introduction and use of mathematical probability statistics injected two fundamental prejudicial

errors into the case: 1) the testimony lacked adequate foundation both in evidence and in statistical theory; and 2) the testimony distracted the jury from its proper and requisite function of weighing the evidence and encouraged the jurors to rely upon a logically irrelevant expert demonstration, putting the jury and the defendant at a disadvantage in sifting relevant fact from inapplicable theory.

As pointed out above, the assumption made by the laboratory in this case that the prior probability is fifty percent is not based on any fact in evidence and immediately puts the defendant at an unfair disadvantage if the blood test results are similar to that of the child whose paternity is in question. Furthermore, the distraction of the jury with statistical and mathematical evidence on the ultimate issue deprived appellant of

a fair trial. The statistical approach to the case distracted the jurors from weighing the evidence and determining the ultimate credibility of the plaintiff and the defendant on the ultimate issue of appellant's paternity. As the court in People v. Collins, supra, noted:

> Confronted with an equation which purports to yield a numerical index of probable guilt, few juries could resist the temptation to accord disproportionate weight to that index... 438 P.33, 40.

Appellant submits that the jury in this case was unquestionably overwhelmed by the testimony and exhibits that the "statistical probability" of his paternity was "99.78%". United States v. Massey, 594 F.2d 676 (8th Cir. 1979) also refused to accept mathematical evidence on the ultimate issue of criminal agency. The appellate court rejected as "speculative and confusing" the "statistical pro-

bability" that certain hair samples matched those of defendant, thereby circumstantially proving his guilt. The court relied upon State v. Carlson, 267 N.W.2d 170 (Minn. 1978) in which that court stated:

> Our concern over this evidence is...with its potentially exaggerated impact upon the trier of fact. Testimony expressing opinions or conclusions in terms of statistical probabilities can make the uncertain seem all but proven, and suggest, by quantification, satisfaction of the requirements that guilt be established "beyond a reasonable doubt". Diligent cross-examination may in some cases minimize statistical manipulation and confine the scope of probability testimony. We are not convinced, however, that such rebuttal would dispell the psychological impact of the suggestion of mathematical precision, and we share the concern for "the substantial unfairness to a defendant which may result from ill conceived techniques with which the trier of fact is not techniquely equipped to cope. 267 N.W.2 at 176 (citations and footnote omitted). [Emphasis added.]

In Dorsey v. State, 276 Md. 638, 350 A.2d 665 (1976), the Court of Appeals of Maryland rejected testimony by a detective stating the percentage of his arrests which resulted in conviction. Importantly, the court noted that:

> Even in those jurisdictions "in which the courts have ruled on the admissibility of [expert] statistical or mathematical evidence offered to show the probability that the defendant was, or was not, the person who committed the alleged crime, or that he was, or was not, connected with the criminal act in some way...the Court(s) [have] held that it was reversible error to permit an expert witness to [so] testify...". [Citations omitted.] 276 Md. 638, 644.

The case of Alinda V. v. Alfredo V., 125 Cal. App. 3d 98, 177 Cal.Rptr. 839 (1981) involved a paternity action in which the plaintiff-mother introduced an HLA test result that the statistical probability of the alleged father's paternity was 98.5%. The trial court rejected the

evidence and on appeal, the California Court of Appeal stated:

> There is a very material difference between the test result and the statistical result of probability of paternity. The evidence was uncontradicted that an HLA test could show that a defendant biologically could not be the father or it could show that a defendant is biologically within the class that could be the father. A blood test could not show that the defendant was the father.
>
> * * *
>
> The [trial] court, however, properly found that the statistical result of the test, which stated that there was a 98.5 percent probability of defendant's paternity of plaintiff was inaccurate and not entitled to any substantial evidentiary weight. The evidence was presented by the medical technologist from the University laboratory whose knowledge of the case was limited to the blood typing. She did not know the extent or nature of the other evidence to be introduced at trial, and she was not in a position to weigh the evidence and make a mathematical determination of the probability of paternity. The trial court's finding of fact

was correct. 125 Cal. App. 3d 98, 101. [Emphasis added.]

See also McCormick on Evidence, 2d Ed. (West, 1972), Section 204 entitled "The Theory of Probabilities as Applied to Questions of Identification" for an excellent discussion of the reported case law in this area.

Appellant respectfully asserts that the reasoning behind all of the reported decisions rejecting the attempt to quantify issues of proof into a "statistical probability is based upon the distrust for the reliability of that evidence and also the exaggerated impact upon the factfinder. This case exposes the flawed methodology inherent in the statistical presentation of the blood testing laboratory and clearly establishes substantial prejudice to the due process rights of appellant through the use of such evidence.

Conclusion

For all of the above reasons, this Court is urged to reverse the judgment of the Court of Special Appeals of Maryland and to remand the case to that court with directions to enter an order reversing the decrees of the Circuit Court for Baltimore City dated April 4, 1986 and May 7, 1986 and awarding appellant a new trial.

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APPENDIX TO JURISDICTIONAL STATEMENT

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IN THE CIRCUIT COURT
FOR BALTIMORE, MARYLAND

CHRISTINE J. YOUNG	*	
Petitioner	*	Paternity
v.	*	Docket 77991
THOMAS R. KAMMER	*	Baltimore, Maryland
Respondent	*	
	*	June 9, 1983
	*	

****

BEFORE:

THE HONORABLE J. OWEN WISE, JUDGE

APPEARANCES:

ON BEHALF OF PETITIONER:
ROBERT MOSS, ESQUIRE

ON BEHALF OF RESPONDENT:
CLAY M. BARNES, ESQUIRE

REPORTED BY:

SUSAN M. SHELDON,
OFFICIAL COURT REPORTER

OPINION OF THE COURT

THE COURT: Now, to hopefully advance the cause of justice in the State of Maryland and provide a basis for whatever judge hears this case on the merits,

I am going to ask the court reporter in due course to type up my opinion and observations concerning the primary matter that has occupied us for the last day or so.

The first thing is that counsel are to be commended for the thorough research and presentation that was done factually and legally in presenting the issue of the admissibility of the test results and background information concerning those tests in this case.

The question, of course, is the admissibility of Exhibit Number 1 of the Petitioner which I think is dated November 11 of 1982. The question is not before the Court as to whether or not the tests underlying those results are or are not valid in an absolute sense. The only question is whether or not this piece of paper, piece of evidence is admissible in

court.

In order to determine that, the yard markers, if you want to call them that, are contained in the statute, specifically Article 16, Section 66-G. The Legislature obviously has evinced the policy that blood tests in paternity cases shall have some credibility and recognition. That's why they have the section in the law at all entitled "Blood Tests", and as we have agreed and know, before July 1 of 1982 any kind of a blood test could only be used in evidence if it showed exclusion of the person charged with being the father.

Chapter 784 of the Act of 1982 has apparently attempted to enlarge the class of cases in which such tests are admissible. There are several features of that Act that bear scrutiny in this determination and rather than looking at

the Annotated Code I have done, as Mr. Barnes indicated he did, which was to get a copy of the section law in which this bill was proposed which shows the deletions from the existing law as well as some of the proposals that didn't become enacted and that may shed some light on the legislative intent.

The first thing that the Court notes is that the word "may" is prefatory to the whole section and as far as admissibility of such test in evidence. It says the test results may be received in evidence. So that implies that there is nothing automatic or binding upon the Court insofar as permitting them, as a right to be introduced, and implies that the Court is supposed to scrutinize or at least apply some standard evidentiary principles to their proffered admission.

The second thing is the statute is

internally inconsistent in its usage of terms. The first statement that we find relating to this subject says the test results. That is the words that was used. Later in this new sentence that was added it refers to if testing was sufficiently extensive, and in other places it refers to -- for instance, it says reports of such tests. So apparently they are using test results, testing and tests interchangeably. Grammatically I have a problem with finding that this is so, but the computer, the Legislature is referring to them all in one lump bundle.

Presumably also the letter, which is really what it is, that is Petitioner's Exhibit 1, is a compilation or accumulation of those three things. You have the test, the testing and the test results all in one document, and for present

purposes I will assume that that complies with the statute if for no other reason then I will take judicial notice that that is the form on which most paternity testing results have been sent or proffered in evidence in the courts of Maryland which I am aware of for quite some years.

I assume that the language of the statute -- Reports of such tests shall be made by such laboratories and in writing and in the form required by the Court-- presumably the Court can require the form on a case-by-case basis, county-by-county basis. The Legislature has not required it be uniform, simply that the Court require it.

The more significant features that really are the nuts and bolts of the controversy here is how to read the new language in the statute. Mr. Barnes

referred to it as being two prongs and that is probably not a bad characterization.

The first prerequisite that appears is that if testing was sufficiently extensive to exclude 97.3 percent of the putitive fathers who are not biological fathers -- and then there is a comma. So the first prerequisite of the admissibility of any test is that it be shown that the testing was sufficiently extensive to exclude 97.3 percent of putitive fathers who are not biological fathers.

I assume that this is a protection to the various nameless males who make up the bulk of the population and who really don't have anything to do with most paternity cases. So the first prerequisite is an exclusive one relating to the males in the world at large.

Then -- and it is prefaced by the way by the word testing. Then after the comma it says and the statistical probability of the alleged father's paternity is at least 97.3 percent. Now, in analyzing this legally and grammatically it is very significant that there is nothing after that comma that relates to what is before the comma and it in fact seems to be not even the flip side of the same coin.

In the first place, the preceding words testing, biological and so forth have no relation. The first mention of statistical is after the comma, and it says statistical probability which is new terminology unrelated to anything before the comma.

The second thing is that we are now talking about the alleged father's paternity which is an affirmative finding,

whereas in the first prerequisite we are talking about or the statute is talking about exclusion of the rest of the world.

So it is pretty clear grammatically and legally that there are two separate conditions precedent that have to be met for the admission into evidence of any test or testing. One has to do, as I indicated, with the exclusion of the rest of the world and the other has to do with inclusion of the man or person who is the alleged father.

If it was intended that the 97.3 percent be synonymous and that the one test that excludes 97.3 percent of the rest of the world simultaneously includes and satisfies the probability requirement with respect to the father, it defies grammar and statistics and my mind to see how that could be, and if that is what the Legislature intended they should

have said by a single test the same results are accomplished.

So the phrase at the end of that sentence -- and the statistical probability of the alleged father's paternity is at least 97.3 percent -- stands on its own, grammatically and legally, and it is unrelated to any blood testing that has been done or may be offered in evidence.

The Legislature apparently did not choose to change the language that has been in there for some time that the reports on admissible evidence shall be accepted as prima facie evidence as the results of the tests have a rather significant evidentiary value by statute that they would not have otherwise. So much so that the Court could even instruct the jury that the test was prima facie evidence of the results thereof, and that is simply stated as a notation of why some

scrutiny may be required before accepting the test results for something that they are not.

Now, the statute also says and has for some time than when the test -- and again the Legislature is interchanging the terminology -- when the tests are admitted into evidence. We noticed previously the test results may be received in evidence. Now, they are saying tests. Presumably that is the same thing.

When the tests are admitted into evidence the laboratory technicians are subject to cross-examination by all parties to the proceeding. That certainly infers or implies that the only way the test results are admissible is through live witnesses, being the lab technicians. Whether they have to be the actual persons who handled the test tubes or whatever they are called in which the

blood is handled is the same evidentiary problem faced in all cases.

As a general rule, most courts permit people who do things under the direct supervision of other people to testify as to how it was done provided the person has some basis for testifying that he or she knows that a particular employee under his direction or supervion did do certain things.

Therefore, in the normal course of events, the lab technicians either themselves or their supervisors would be admitted under the statute to testify as to tests which presumably includes blood tests such as the question here, would permit those lab technicians to testify and through them to introduce the results of the blood tests.

Whether or not those same lab technicians could testify to the extensive

nature of the test since that may be an ultimate determination for the trier of fact is a question. However, I would say in this case and in most cases they can testify as to the nature and extent of the testing they did.

Whether or not that is sufficiently extensive to exclude 97.3 percent of putitive fathers is an ultimate decision to be made by the trier of fact based upon evidence given by both sides, including the lab technicians. That would supply the initial threshold requirement for the first prong.

Now we go to the second prong which is the statistical probability of the alleged father's paternity is at least 97.3 percent. The first problem in this case and in most cases is that the lab technicians have no formal training, education or other ability above that of the

average layman to say anything about statistical probabilities.

The second problem is that the blood test proffered here and the most commonly used are not statistical tests, analyses or evaluations. They are blood grouping comparisons. Therefore, in the normal case absent some special testing and special qualification on the part of the lab technician, the lab technicians have no expertise or basis by which they can testify as to the statistical probability of inclusion of the alleged father's paternity.

The means that in this case and others that requirement will have to be complied with independently. If it is impossible to obtain a person trained in statistics, whether it be biostatistics or other kinds of statistics, to testify as an expert witness in each and every

paternity case, the difficulty lies in Annapolis with the Legislature. If they passed the law that was impossible of complying with, someone should ask them how thorough was their hearing process. If it had been as thorough as we have even conduced here they would never have written the statute as they did. If it was that thorough they weren't awake when they were listening to the testifying.

The basic principles of evidence would, of course, apply to this question as well as to any other evidentiary question in this trial. So that the first thing that would have to be complied with is that the proffered witness would have to qualify out of the presence of the jury as an expert and have some reasonable basis for saying how he or she could arrive at a statistical probability that complied with the statute.

The point is that as the Law Review articles and some of the prior court decisions have pointed out it is easy to assume because a blood grouping report comes out in the form of percentages and statistics that it is, therefore, a statistical report. It is not. It doesn't even purport to be and neither did the people who write it. The mere fact that it is stated in terms of numbers makes it appear to the courts and judges as well as to the jury that it is something it isn't.

The issue here is not really a question of what the Legislature should have done or even what they tried to do. The question is what they have in fact said, and it seems pretty clear to me grammatically what they have said. Whether they intended that or not remains for them to say. They can change the law

if they did not.

It may well be in order to give meaning and effect to the legislation that since they were now going from an exclusionary evidentiary statute to an inclusionary one that they intended to require the proponent of such evidence to produce greater evidence of the validity and authenticity of that which the proponent was assertive, to wit: showing the statistical probability of paternity, before allowing the jury to assume or infer that.

The point is that the Legislature structured its statute in terms of percentages, not only percentage but a precise 97.3 percent. Why they did that is probably speculative but they did it and that is the standard by which the introduction of evidence has to be measured. They did not say a test of

white blood cells. They did not say an HLA test. They did not even use the term genetic marker test. Apparently, those terms would come pretty close to passing evidentiary muster because they seem to be pretty well accepted in the trade, in the world for that matter and have for some time. Everybody knows what such tests are but the Legislature did not choose to use that language in describing what tests were admissible.

The construction I have placed on the statute does give meaning and effect to it and harmonizes it and makes it consonant with the prior statute as well as the attempted purpose as far as can be determined from the preamble of the Legislature's modification of it.

So to summarize what I have said, there are two precedents to admissibility of any blood test under this statute.

The first is that the testing be sufficiently extensive to exclude 97.3 percent of the rest of the males in the world and secondly and independently, that there be a 97.3 statistical probability shown of the alleged father's paternity.

The lab technicians can presumptively testify as to the first requirement. In most cases they would not be able to testify in regards to the second.

The long and short of it is that applying the statute as I have here the State or Petitioner is going to have to have a statistician or biostatistician to prove, or at least produce evidence over objection, any blood test.

Now, to put those comments in perspective as far as this case is concerned, the Court's pre-trial ruling is as follows: That the proffered report, Petitioner's Exhibit Number 1,

can only be received in evidence if it is authenticated by the lab technicians who either performed the tests or supervised their performance and a qualified expert in statistics is first produced to the trial judge outside the presence of the jury who can make a reasonable prima facie showing that he or she is willing to testify before the trier of fact that the statistical probability of the defendant's paternity is at least 97.3 percent.

If that showing is made the trial judge would then be justified in permitting all of that evidence to be considered by the jury in connection with any and all other evidence in the case.

Finally, as a gratuitous editorial, it certainly seems to me that while it is no longer called the Supreme Bench of Baltimore City that the judges at least

in Baltimore City ought to have the whole matter brought to their attention and resolved for uniformity's sake. I would think this could be done in the fashion of a reservation of points for an en banc so that the procedures and the policies and the form even for blood tests could be standardized and everyone would know in advance what is required and admissible, judges and attorneys alike, and it would not be necessary to devote further court time to what we have already done.

(CONCLUSION OF OPINION)

CHRISTINE J. YOUNG	*	IN THE CIRCUIT
Plaintiff	*	COURT FOR
v.	*	BALTIMORE CITY
THOMAS ROBERT KAMMER	*	PD 77991 44/397/1982
Defendant	*	

****

MEMORANDUM OPINION AND ORDER

On February 10, 1982, Plaintiff, Christine J. Young, filed a Paternity Petition requesting the Court to pass an order declaring Thomas Robert Kammer to be the father of the child born to her on May 24, 1982. On September 10, 1982, the Court ordered Defendant to submit to blood tests. After various discovery motions were decided, Defendant filed a Motion for Pretrial Determination of Admissibility of Blood Tests on June 7, 1983, arguing that the results of the blood tests did not comply with Maryland Code Annotated, Article 16, Section 66G, and, even if they did comply, there was no admissible evidence of either the test

results or their interpretation. For these reasons and the likelihood that a jury would put great emphasis on the test results, Defendant sought to have the Court determine the admissibility of the blood tests prior to any mention of them before a jury at trial. Upon this Motion, a hearing was held on June 9 and 10, 1983, in front of Judge Owen Wise, sitting as a Visiting Judge of the Circuit Court for Baltimore City. Judge Wise interpreted the statute to require a showing that the testing was sufficiently extensive to exclude 97.3% of putative fathers and to require, independently of the above requirement and unrelated to any blood testing that had been done, a 97.3% statistical probability of the alleged father's paternity. Judge Wise felt that the testimony of laboratory technicians would suffice for the first

requirement but that testimony by a statistician or bio-statistician would be required as to the statistical probability.

Subsequent to this hearing, Judge Wise directed that the case be rescheduled, by agreement of the parties. On September 13, 1983, the case was set before this Court, at which time the issue of the blood test admissibility was again raised. Defendant had filed a Motion for a Protective Order prohibiting Plaintiff from using the testimony of T. Michael Conneally, Ph.D. unless Dr. Conneally appeared for deposition at least one week prior to trial. This Court denied that Motion but allowed Defendant to depose the witness in open court on that day, September 13, 1983. In addition, this Court permitted counsel for Defendant to have fifteen days in

which to reply to Dr. Conneally's testimoney, in specific, to provide an affidavit or transcript of Dr. Gary Chase's testimony, but the Court denied counsel's request for another hearing. On September 29, 1983, Defendant filed a Supplemental Motion for Pretrial Determination of Blood Tests, again requesting an additional hearing, claiming insufficient time to reply to Dr. Conneally's testimony and that the action of this Court on September 13, 1983, was unfair.

On January 3, 1984, in response to a request by Plaintiff's counsel for a ruling, this Court advised counsel for Defendant that, having allowed him over three and one-half months to file a memorandum and affidavit or transcript, the Court would rule on the admissibility of blood tests after February 6, 1983. Defendant's counsel's response to this

letter yet again requested a hearing, claiming that "the court intends to deny the right of the defendant to follow proper procedure", and informing the Court that a deposition of Dr. Chase was scheduled for January 17, 1984. The transcript of Dr. Chase's testimony was received by the Court on February 2, 1984, over four and one-half months after it was requested.

The function of the Court when reviewing a piece of legislation is to glean the General Assembly's intent and to effectuate it. The rules of construction that bind the Court in its interpretation are clear and well-established. Principally, a court must look to the actual language of the statute, giving words their ordinary and plain meaning. When the statutory language is ambiguous, a court must consider the legislative

intent and purpose behind the statute's enactment and interpret the language in a manner consistent with that legislative intent. State v. Berry, 287 Md. 491, 413 A.2d 557 (1980); Board v. Stephens, 286 Md. 384, 408 A.2d 1017 (1979).

Until the enactment of Chapter 784 of the 1982 Laws of Maryland, blood test results in paternity cases were admissible only to exclude the putative father. Recognizing the scientific advancements made in genetic testing, the Maryland General Assembly amended Article 16, Section 66G to read as follows:

Section 66G. Blood tests.

> "The court, upon motion of a party to the proceedings or upon its own motion, shall order the mother, child, and alleged father to submit to blood tests necessary to determine whether or not the alleged father can be excluded as being the father of the child. The test results may be received in evidence in cases where

definite exclusion is established, and in cases in which exclusion is not established, if testing was sufficiently extensive to exclude 97.3 percent of putative fathers who are not biological fathers, and the statistical probability of the alleged father's paternity is at least 97.3 percent. The tests shall be made in laboratories selected by the court from a list provided by the Child Support Enforcement Administration of the Department of Human Resources. Reports of such tests shall be made by such laboratories in writing and in the form required by the court. Copies of the reports shall be furnished to the petitioner or complainant and to the alleged father or their counsel. The reports, when admissible in evidence, shall be accepted as prima facie evidence of the results of such tests. Unless indigent, the party requesting the blood tests shall be responsible for their costs; however, if the requesting party prevails in the action, the court shall assess such costs against the other party or parties in the action. If a party is indigent, the tests shall be paid for by the county or city where the proceedings are

> pending, unless the court orders one or more of the parties to the proceedings to pay for all or part of the costs. When the tests are admitted in evidence, the laboratory technicians who made them are subject to cross-examination by all parties to the proceedings. If any person fails to submit to the blood tests ordered by the court, such facts, when properly adduced by evidence, shall be disclosed to the court and jury and may be commended upon by the court or by counsel to the jury or to the court when the case is tried without a jury".

As a preliminary issue, it is important to note that the Court of Special Appeals in Haines v. Shanholtz, 57 Md. App. 92 (1984), interpreted the amended statute and overruled a trial court's ruling that blood test results were inadmissible in a paternity suit because appellant could not establish that the test results were generally accepted in the scientific community as being reli-

able. The Court found that the Legislature expressly recognized the reliability of genetic testing when it adopted Chapter 784, Acts of 1982, effective July 1, 1982. The Court stated:

> "The statute, Article 16, Sec. 66G, furthermore, provides that all parties shall have the right to cross-examine the laboratory technicians who conducted the tests. The legislative intent is clear--genetic testing is valid, subject to cross-examination of those responsible for performing and evaluating the tests. The trial judge has the discretion of admitting testimony that may have a bearing on the weight of the testimony offered as to the genetic testing, but not, by reason of the statute, as to the admissibility vel non of genetic testing to establish paternity." Haines at 98.

The issue in the instant case is not whether the actual blood tests are admissible, but whether the form of blood tests results in this case as supplied by

Baltimore Rh Typing Laboratory complies with the statutory requirements and may be admitted into evidence. The form on which the test results are revealed contains two numerical conclusions: "Paternity Ratio = 460 to 1" and "Plausibility of Paternity = 97.8%". The crux of the controversy is whether the "plausibility of paternity = 99.78%" statement on the test result form complies with the statutory requirement that the "statistical probability of the allged father's paternity is at least 97.3 percent". Defendant argues that the results provided here do not comply with the statute and, further, that the statutory requirement is impossible to comply with.

Both sides presented expert testimony to interpret the statute's requirement and the blood test results. It is evident from the experts' opinions that

the terms "plausibility" and "probability" are used in technically different manners by statisticians and in paternity testing.

The testimony of Dr. Michael Conneally was taken in open court on September 13, 1983. Dr. Conneally, qualified as an expert in paternity testing, reviewed the data provided by the Baltimore Rh Typing Laboratory. He concluded that the plausibility figure is interpreted to mean that the probability that defendant is the father of the child when compared or relative to another man picked at random in the population is 99.78% (Transcript, p. 1-10, 1-11, 1-12). Dr. Conneally testified:

> "The three of those, plausibility of paternity, likelihood of paternity and probability of paternity thorugh there are slight differences in these terminologies from a purely statistical point of view, these three are used synony-

> mously and interchangeably in the paternity text books and by paternity experts in general." (Transcript, p. 1-11).

Defendant's counsel questioned Dr. Conneally as to the doctor's clarification that the number stated was not the statistical probability of paternity but the probability of paternity relative to a random man. Dr. Conneally responded:

> "...It is not the statistical probability that the man is the father of the child, but the statistical probability of paternity as commonly meant in the community of paternity testing.
>
> "That is meant to mean the probability that the man is the father relative to a man picked at random in the population." (Transcript, p. 1-21 - 1-22).

In response to the Court's question, Dr. Conneally stated that there is no other way to establish paternity, other than the use of similar tests. (Transcript, p. 1-22).

The testimony of Gary Andrew Chase, Ph.D., was taken on behalf of defendant by deposition on January 17, 1984, and in response to Dr. Conneally's testimony. Dr. Chase was qualified as an expert in bio-statistics with a specialization in probability classification in genetics. Dr. Chase testified that the plausibility figure on the test report sheet was not a statistical probability of the alleged father's paternity.

> "...Well, the word plausibility, in the science of probability and statistics, does not refer to numbers. It refers to a judgment concerning hypotheses, how plausible is a hypothesis. So this term, the plausibility of paternity, has no real meaning within the field of probability and statistics." (Deposition, p. 8-9).

When confronted with Dr. Conneally's testimony dealing with the "community of paternity testing" definition of statistical probability quoted above, Dr. Chase

replied:

> "What he means is that the community of paternity testing has arrived at an incorrect labeling of that, mathematically. They have -- they are calling it a probability, but it is not something that an expert in probability and statistics would call it." (Deposition, p. 18).

Dr. Chase explained that two mathematical components are combined in order to determine a statistical probability. In this instance, Dr. Chase agreed with the computation of the paternity index but had reservations concerning the use of a .5 prior probability he felt was arbitrarily introduced. Dr. Chase stated that more than a blood test was necessary; in order to obtain a probability of paternity as defined by a statistician, the facts must be determined to justify the use of a prior probability. (See deposition, p. 23-24) Dr. Chase did state that "if the Court believes the prior probabi-

lity supplied by the plaintiff and the blood group evidence, then the final result would indeed be a statistical evidence of paternity." (Deposition, p. 44) He agrees that if a .5 prior probability was used in conjunction with the paternity index, the Baltimore Rh Testing Laboratory's plausibility figure of 99.78% would be the statistical probability of the Defendant's paternity. (Deposition, p. 41).

If the arguments propounded by defendant are accepted by the Court, the General Assembly's amendment would be for naught. Dr. Chase's argument against the plausibility figure being a statisti-cal probability as required by the statute hinges upon his belief that the introduction of a prior probability figure of .5 is improper without a determination of the facts. Defendant

suggests that the Legislature has created a statute impossible to comply with; in order to properly calculate a "satistical probability" someone must decide that Plaintiff's story is more credible than Defendant's in order to justify the use of any specific prior probability factor. Dr. Chase seeks a pure statistical "probability" rather than Dr. Conneally's understanding of the term as it is used by those in paternity testing. Dr. Conneally, upon Defendant's questioning on the use of prior probability, stated that his computations, based upon the figures supplied by the Baltimore Rh Typing Laboratory, would give the same result whether or not he used a prior probability of 50/50. (Transcript, p. 1-16).

To restrict blood tests so much as to require justification of the use or

prior probability, as Dr. Chase testifies is required from a statistical viewpoint, would require a finding that the Defendant could have been the father and a determination of how many other men with whom the mother had sexual relations could be the father. These determinations would then be used to introduce a prior probability, and calculate a statistical probability, thus allowing the admission of blood test results into court for determination of paternity. The figures required by statute and provided by the Baltimore Rh Testing Laboratory assume the first finding -- if the Defendant were in Mongolia and locked up in jail at the time the child could have been conceived, as a practical matter there would be no paternity case being brought against him. Defendant could produce a parade of possible fathers but

the blood test result would still be admissible; the possibility that a plaintiff had relations with other men goes to the weight of the blood test evidence, not to its admissibility.

As stated by the Court of Special Appeals in Haines, the legislative intent behind the enactment of Chapter 784 is clear -- genetic testing is valid and admissible to establish paternity. 57 Md. App. at 98. The General Assembly deliberately amended the Code section which had previously allowed blood test results to be admitted only to exclude the defendant from being the father of the child. It would be redundant, inefficient and clearly inconsistent with the legislative purpose behind the amended statute to require any fact finding before the test results would be calculated. The blood testing community

routinely makes calculations based solely upon the test data; the Legislature intended that these calculations be admissible.

As pointed out in Haines, the Legislature heard testimony in 1980 and 1981 before amending Section 66G. The Haines Opinion reviews the testimony and credentials of Margaret Brooks, General Supervisor of the Red Cell Lab at the Baltimore Rh Laboratory, pointing out that Mrs. Brooks testified before committees of the Maryland Legislature prior to the Section 66G amendment. 57 Md. App. at 99, 100. Mrs. Brooks was called as an expert in the Haines case and stated that the percentage figures required by the amended statute were developed from information supplied by the Baltiore Rh Typing Laboratory. The inconsistent views held by experts testi-

fying in the instant case result from semantic differences between those who do paternity testing and those who specialize in statistical analysis of data. Dr. Chase admits this himself:

> "...the community of paternity testing has arrived at an incorrect labeling...they are calling it a probability, but it is not something that an expert in probability and statistics would call it. (Deposition, p. 18).

It is evident from the wording of Article 16, Section 66G, as amended, and its interpretation by the Court of Special Appeals, that the General Assembly fully intended that blood testing procedures and the results, such as those provided by the Baltimore Rh Typing Laboratory in the instant case, are to be admissible into evidence. The Legislature investigated the practices of the paternity testing community and adopted its terminology in developing the

amended statute. To interpret the statute in any other way would be inconsistent with the clearly established aims of the Legislature.

Furthermore, the Court agrees with Plaintiff's contention that Article 16, Section 66G does not require the process for admission of blood test results Defendant argued was necessary in the instant case. The Haines decision clearly states that the Legislature has recognized the reliability of genetic testing. "The legislative intent is clear -- genetic testing is valid, subject to cross-examination of those responsible for performing and evaluating the tests." 57 Md. App. at 98. The Court found that "in many instances the person who conducts the test also interprets the results. Firearms identification, fingerprint and drug analysis

are illustrative techniques." 57 Md. App. at 99.

Accordingly, it is this 5th day of March, 1984, ORDERED, ADJUDGED AND DECREED for the reasons stated above that the blood test results supplied by Baltimore Rh Typing Laboratory in this case shall be admitted into evidence at the trial herein with the laboratory technicians who made the test being subject to cross-examination at trial as required by Article 16, Section 66G of the Annotated Code of Maryland, as amended by Chapter 784 of the 1982 Laws of Maryland.

s/Joseph H. H. Kaplan
Judge

cc: Robert M. Moss, Esq.
Martin McGuire, Esq.
Clay M. Barnes, Esq.

CHRISTINE J. YOUNG	*	IN THE CIRCUIT
Plaintiff	*	COURT FOR
v.	*	BALTIMORE CITY
THOMAS ROBERT KAMMER	*	PATERNITY DIVISION
Defendant	*	
	*	Case No.: PD 44-77991
	*	DRD Case No.: 735/82

****

DECREE DETERMINING PATERNITY

The above entitled case having come on for a hearing on the Paternity Petition heretofore filed, the testimony of witnesses heard and considered, and the respondent having been found by the jury on March 6, 1986 to be the father of John Thomas Young born to the plaintiff, Christine J. Young, on May 24, 1982, it is this 4th day of April, 1986, by the Circuit Court for Baltimore City, Adjudged, Ordered and Decreed,

That Thomas Robert Kammer, defendant, is the father of the child known as

John Thomas Young born May 24, 1982 to the plaintiff, Christine J. Young. And it is

FURTHER OREDERED that custody and guardianship of the said child is given to the mother. And it is

FURTHER ORDERED that all remaining issues shall be set for hearing in accordance with the custom and practice of the Circuit Court for Baltimore City.

s/John N. Maguire
Judge

True Copy Test

s/Saundra E. Banks
Clerk

CHRISTINE J. YOUNG 833 Jack Street Baltimore, MD 21225	*	IN THE CIRCUIT COURT FOR
Plaintiff	*	BALTIMORE CITY
v.	*	PATERNITY DIVISION
THOMAS ROBERT KAMMER 2713 Eastern Avenue Baltimore, MD 21224	*	Case No.: 44-77991
	*	DRD Case No.: 735-82

****

MODIFIED PATERNITY DECREE

The above entitled case having come on for a hearing on the remaining issues of support, retroactive support, reimbursement of blood test costs, expert witness fees and expenses and court costs, pursuant to the Decree of Paternity dated April 4, 1986, the testimony of witnesses heard and considered

It is this 7th day of May, 1986, by the CIRCUIT COURT FOR BALTIMORE CITY, Adjudged, Ordered and Decreed,

That the defendant, Thomas Robert Kammer, shall pay, through the Bureau of

Support Enforcement the sum of $80.00 per week, effective April 4, 1986, for the support of the child, John Thomas Young, until said child reaches the age of eighteen years, dies, marries, or becomes self-supporting, whichever event first occurs. And it is

FURTHER ORDERED that the payments are to be made by lien on the defendant's earnings, however, the defendant, Thomas Robert Kammer, is to make the payments directly to the Bureau of Support Enforcement until the lien is reflected on his payroll check. And it is

FURTHER ORDERED that payments under this Order shall be remitted by the Bureau of Support Enforcement to the person, institution or agency determined by the Court or Master, Domestic Relations Division, to have the legal or actual custody of said child. And it is

FURTHER ORDERED that the defendant shall report to the Bureau of Support Enforcement as directed; shall immediately notify the Bureau of Support Enforcement of any changes affecting his ability to make payments under this Order; to report any change of residence to the Bureau of Support Enforcement within ten (10) days of such change; and shall appear in Court in response to any notice served upon him by mail or by any Peace Officer, in connection with this Order. And it is

FURTHER ORDERED that the defendant, Thomas Robert Kammer, shall pay immediately in a lump sum payment, the sum of $187.50 to reimburse the Mayor and City Council for monies advanced for a blood test that was performed by the Baltimore Rh Typing Laboratory. Said payment to be remitted to the Bureau of Support

Enforcement, 100 N. Eutaw Street, Baltimore, Maryland 21201. And it is

FURTHER OREDERED that the plaintiff, Christine J. Young, shall pay the sum of $2.00 per week to reimburse the Mayor and City Council of Baltimore for monies advanced for a blood test that was performed by the Baltimore Rh Typing Laboratory. Said payment is effective May 2, 1986 and is to be remitted to the Bureau of Support Enforcement, 100 N. Eutaw Street, Baltimore, Maryland 21201, and is to continue until the $187.50 is paid in full. And it is

FURTHER ORDERED that the costs of these proceedings shall be waived. And it is

FURTHER ORDERED that the issue of reimbursement of expert witnesses fees and expenses is subject of the Further Order of this Court. And it is

FURTHER ORDERED that the provisions of this Decree pertaining to guardianship, custody, support, bond and relationship with the Bureau of Support Enforcement remain subject to the further Order of this Court.

s/Kathleen O'Ferrall Friedman
Judge

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this the 7th day of May, 1986 a copy of the aforegoing Modified Paternity Decree was mailed to Clay Barnes, Esquire, 405 W. Pennsylvania Avenue, Towson, Maryland 21204, attorney for the defendant, Thomas Robert Kammer.

s/
Robert M. Moss
Assistant State's Attorney

True Copy Test

s/Saundra E. Banks
Clerk

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 49

September Term, 1987

THOMAS ROBERT KAMMER

v.

CHRISTINE J. YOUNG

Bishop
Alpert
Karwacki,
JJ.

Opinion by Bishop, J.

Filed: January 13, 1988

A Baltimore City jury found appellant, Thomas Robert Kammer, to be the father of the child of Christine J. Young, appellee. From the decree of the circuit court based on this verdict, Kammer appeals.

We are presented with three issues:

I. That the admission of the blood test evidence was: (a) not in compliance with MD. FAM. LAW CODE ANN. 5-1029; and (b) a violation of appellant's due process rights under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights;

II. That certain hearsay testimony excluded by the court should have been admitted; and

III. That the court erred in refusing to give certain jury instructions proposed by appellant.

FACTS

Appellee gave birth to a child on May 24, 1982. She alleged that appellant was the only man with whom she had had sexual intercourse in the year immediately preceding the child's birth. Appellant responded that his sexual relations with appellee had ended more than 15 months before the birth.

The court admitted into evidence, over objection, the results of the blood tests of appellant, appellee and the child, obtained in accordance with MD. FAM. LAW CODE ANN. Section 5-1029. Additional facts will be given in the course of the discussion of the issues.

I.

Admissibility of Blood Test Evidence

(a)

Admission of Opinion Evidence Concerning the Interpretation of the Blood Tests

In his attack on the admissibility

of the interpretation of the blood tests, appellant claims that:

> (1) the expert witnesses appellee called at trial were not qualified to perform statistical analysis, to interpret the results or to express an opinion on the ultimate issue of the "statistical probability" of the appellant's paternity; and
>
> (2) the number presented to the jury was predicated upon a scientifically invalid formula and was not a competent "statistical probability of paternity" thereby rendering the laboratory report inadmissible at trial.

Appellant also asks that we reconsider our decision in Haines v. Shanholtz, 57 Md. App. 92, cert. denied 300 Md. 90 (1984), in which we held that by virtue of legislative enactment, blood test results which meet certain threshold requirements are admissible. We decline to do so.

This controversy is governed by Section 5-1029 of the MD. FAM. LAW CODE

ANN. (1984) which provides in pertinent part:

5-1029. Blood tests.

(a) In general. - On the motion of a party to the proceeding or on its own motion, the court shall order the mother, child, and alleged father to submit to blood tests to determine whether the alleged father can be excluded as being the father of the child.

(b) Approved laboratory required. - The blood tests shall be made in a laboratory selected by the court from a list of laboratories provided by the Administration.

(c) Form of results. - The laboratory shall report the results of each blood test in writing and in the form the court requires.

(d) Copies of results. A copy of the results of each blood test shall be provided to the parties or their counsel in the manner that the court directs.

(e) Results as evidence. - (1) The results of each blood test shall be received in evidence if:

(i) definite exlcusion is established; or

(ii) the testing is sufficiently extensive to exclude 97.3% of alleged

> fathers who are not biological fathers, and the statistical probability of the alleged father's paternity is at least 97.3%.
>
> (2) A laboratory report is prima facie evidence of the results of a blood test.
>
> (3) If a laboratory report is admitted in evidence, the laboratory technician who made the test is subject to cross-examination by any party to the proceeding.[1]

We begin our analysis of the applicability of this section to the appellant's claims by setting out the following facts which are undisputed by the parties:

(1) Appellee's witnesses are employed by an approved blood testing laboratory and are qualified in the field of paternity testing, but are not trained statisticians. Appellant's witness is a trained statistician and although he is not employed by a blood testing labora-

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[1] The omitted subsections, (f) and (g), deal with failure to submit to the tests and payment of costs for the tests.

tory, he does consult as part of his employment, with the paternity testing laboratory at Johns Hopkins Hospital.

(2) The blood tests were performed by an approved laboratory and the testing was done for blood group markers in seven different systems, six in the red cell laboratory and for HLA[2] in the white cell laboratory.

(3) The combination of the HLA and red cell tests is sufficiently extensive to exclude more than "97.3% of alleged fathers who are not biological fathers".

(4) The "paternity index"[3] in this case is 460 to 1, i.e. it is 460 times

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[2] HLA is the abbreviation for human leucocyte antigen.

[3] A paternity index is a ratio which expresses the odds that the accused is the father of the child based on his chance of producing a sperm that carries all the necessary genetic information in conjunction with the mother's genetic information as compared to finding such a sperm in the random population.

more likely that appellant could produce the single sperm carrying the necessary genetic information than a random man in the population.

(5) The prior probability[4] used by the laboratory in converting the paternity index to a percentage was .5, and that number is the standard used for such tests.

(6) Using a prior probability of .5, the percentage which results from application of Bayes' Theorem[5] to the paternity index of 460 to 1 is 99.78%.

At this point, however, the dispute

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[4] Prior probability is expressed as a number, in the form of a percentage, which represents the accumulated non-genetic evidence that tends to indicate the accused man's paternity.

[5] Bayes' Theorem is a mathematical technique accepted in the blood testing field for calculating conditional probabilities. See Ellman and Kaye, Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity? 54 N.Y.U.L.Rev. 1131, 1149 (1979). See infra p. 11 and Appendix.

is centered on Section 5-1029(e)(1)(ii), which requires that "the statistical probability of the alleged father's paternity [be] at least 97.3%". Appellant argues that this phrase should be construed strictly and that the method used to arrive at the percentage should be scrutinized according to the technical definition given by statisticians to the term "statistical probability". This argument forms the basis for his claims that: (1) appellee's witnesses, who lack training in statistics, are incompetent to interpret and to present the results of the blood test as a "statistical probability" of paternity; and (2) the methodology used to arrive at the statistical probability of paternity is based on a scientifically invalid formula and therefore it is not a true "statistical probability" of paternity.

In Haines v. Shanholtz, supra, we

held that by virtue of the adoption of Chapter 784, Acts of 1982, the legislature expressly recognized the reliability of genetic testing.[6] 59 Md. App. at 97. We found the legislative intent "clear" and stated:

> [G]enetic testing is valid, subject to cross-examination of those responsible for performing and evaluating the tests. The trial judge has the discretion of admitting testimony that may have a bearing on the weight of the testimony offered as to the genetic testing, but not, by reason of the statute, as to the admissibility vel non of genetic testing to establish paternity.

Id. at 98 (emphasis in original). The question that arises in the case sub

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[6] Chapter 784 amended Art. 16 Chancery Section 66G, the predecessor of Section 5-1029, and permitted the use of blood test results which are sufficiently extensive to exclude 97.3% of putative fathers who are not biological fathers where the statistical probability of paternity is at least 97.3%. The statute was amended again in 1984 to require the introduction of blood test evidence which meets the statutory standards instead of merely allowing it.

judice is therefore: whether appellant's two-pronged attack goes to the admissibility of genetic testing or to the weight of the testimony offered, the former being impermissible as a result of the statute.

We conclude that the first prong of appellant's attack, regarding the qualifications of appellee's witnesses, goes to the weight of the testimony offered, but we find it unpersuasive. Our review of the legislative history of Section 5-1029(e)(1)(ii) does not support appellant's claim that the legislature intended that the results of the blood test be expressed in terms of a "true" "statistical probability". Neither the Judicial Proceedings Committe of the Maryland State Senate nor the Judiciary Committe of the Maryland House of Delegates received testimony from a statistician, and the legislative history is

devoid of any indication that there was testimony regarding the precise scientific formula required in order to render a "true" statistical probability. We hold that the legislature used the term "statistical probability" within the context and according to the meaning contained in the testimony of the experts from whom it heard: those in the blood testing community, including appellee's witness Margaret Brooks.[7]

Mrs. Brooks testified at trial that the terms plausibility and probability are interchangeable in the blood testing community. We must assume the legislature was aware of this and we therefore reject the "scientifically literal" interpretation of Section 5-1029(e)(1)(ii) urged by appellant. To the blood testing community, the terms

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[7] Mrs. Brooks testified before the Senate committee only.

plausibility and probability carry with them a distinction without a difference.[8] To express the paternity index ratio, which in this case is 460 to 1, as percentage requires the use of a statistical formula.[9] The legislature called the resulting percentage a "statistical probability.[10] Based on the foregoing, we conclude that appellee's expert witnesses qualified, within the relevant community, to conduct the calculations necessary to express the 460 to 1 paternity index as a percentage as is required

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[8] Even appellant's expert witness, Dr. Gary Chase, admitted that the paternity testing community does not use the same terms within the same context as the statistician's community, of which he is a member.

[9] See note 4, supra.

[10] This choice of terms makes sense, because that is how it is expressed in the community that conducts the tests, and because the percentage is reached only after application of a statistical formula.

by the statute. We note that appellant's witness, Dr. Chase, acknowledged at trial that the methods and terms used by the blood testing laboratory are universal in the field of paternity testing.

Appellant's second challenge, regarding the admissibility of the laboratory report, is permissible only to the extent that it goes to the weight of the testimony offered. As we pointed out in Haines, once appellee meets the requirements of Section 5-1029(e)(1)(ii), the statute "mandates the admissibility of the test results". 57 Md. App. at 100-01. Appellant attempts to circumvent this holding by attacking the genetic testing procedure used and by arguing that the intent of the legislature was hardly to sanction an inaccurate or unreliable scientific methodology which results in an incorrect determination of paternity.

We acknowledged in Haines that the Legislature stopped short of adopting "any specific tests to establish the percentages necessary to include or exclude putative fathers". 57 Md. App. at 96. We surmised that the reason for this was that the "General Assembly recognized that new technology may become available and, by not addressing any specific combination of tests, laboratories will be allowed to utilize the most effective tests without further legislative change". Id. The fact that the application of Bayes' Theorem, with a prior probability of .5, to the paternity index does not yield a "true" statistical probability of paternity does not invalidate the procedure or the result. The procedure used in this case is universally accepted by the relevant community of paternity blood testers and is the same procedure that was being used in 1984

when the Legislature amended the blood testing statute to require the introduction of blood test evidence. Indeed, the laboratory that performed these tests and computed these results is the same one that supplied the experts who testified in regard to the 1982 statutory amendment and who testified in Haines.

By contrast, the interpretation urged upon us by appellant would effectively nullify the statute. If we were to agree with his expert, Dr. Chase, no blood testing laboratory could produce results sufficient to satisfy the "statistical probability" requirement of the statute since they would not have access to the relevant non-genetic evidence needed to assign an "accurate" prior probability of paternity to Bayes' Theorem. This interpretation runs counter to the legislative goal which, as expressed in Haines, was "to protect

illegitimate children through court ordered support based upon sophisticated and reliable genetic testing." 57 Md. App. at 96 (emphais added).

(b)

Admission of the Blood Test as a Violation of Due Process

Appellant contends that even if appellee properly complied with the blood test statute, the admission of any opinion evidence concerning the father's alleged "statistical probability" of paternity violates the due process provisions of the United States and Maryland Constitutions.[11] He also claims that apart from the due process violation, the introduction of statistical and mathematical evidence on the ultimate issue before the jury effectively deprived him

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[11] Amendment XIV of the United States Constitution and Article 24 of the Maryland Declaration of Rights.

of a fair and impartial trial by jury as guaranteed by Article 23 of the Maryland Declaration of Rights.

Appellant's due process challenge is actually a two-pronged attack. He asks whether: (1) due process of law permits a paternity index to be converted to a statistical probability of paternity through the use of Bayes' Theorem with an assigned prior probability; and (2) the limited reference population used in this case[12] can be used to compute the "paternity index" used in the equation.

Once appellant's paternity index has been calculated, it must then be converted to a statistical probability in order to determine whether it meets the 97.3% benchmark for admissibility set

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[12] Appellant's blood markers were compared against a gene frequency chart which shows how often his specific gene pattern arose in the United Staes in tests of 12,000 persons of his same race.

forth in Section 5-1029(e)(1)(ii). The mathematical equation used in making this transformation is Bayes' Theorem, a basic formula of probability theory. It is expressed as follows:

$$P(F/M) = (1-f) = (f/P(F))$$

where

$$f = \frac{P(M/not\text{-}F)}{P(M/F)}$$

In this formula, P(F) represents the prior probability and it is factored into the equation in order to account for the non-genetic evidence of the accused man's paternity.[13]

Ideally, the prior probability should reflect an assessment of all the relevant non-genetic evidence in each individual case and should take into consideration such factors as the accused man's opportunity for access to the

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[13] The remaining variables are defined in the attached Appendix.

child's mother during the period of conception, the evidence linking the child's mother to other men during that time period and the credibility of the witnesses. In the case sub judice, however, an assumed prior probability of fifty percent (.5) was used in converting appellant's paternity index to a statistical probability. He contends that this was a violation of his due process rights. We disagree.

Appellant claims that the methodology employed by all of appellee's experts assumes a fact not in evidence (the prior probability) and it is therefore scientifically inaccurate and invalid. We disagree. The evidence presented at trial makes plain that within the relevant community of blood testers, the paternity probability calculations in the present case were based upon scientific methods, accepted world-

wide, which incorporate both Bayes' Theorem and the .5 prior probability.[14] All of the experts who testified at trial agreed that the paternity index, representing only the purely genetic evidence (the HLA and the red cell tests), was 460 to 1. Furthermore, using Bayes' Theorem and a prior probability of .5, all of the experts (including appellant's expert Dr. Chase) calculated the same probability percentage of 99.78%.[15] The mathematical basis for the .5 figure was explained by Dr. Chase in the following manner:

> If you know nothing about a set of possibilities then the principle of insufficient

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[14] Because the use of the .5 as a basis for prior probability meets the requirement of general acceptance in the relevant community, it satisfies the test for admission of scientific evidence set out in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) and adopted by the Court of Appeals in Reed v. State, 283 Md. 374 (1978).

[15] The calculations are set out in the Appendix, infra.

> reason says you are entitled to assign equal prior probability to those alternatives. [T]hat's what's used to get this .5. This .5 comes from a principle that says we don't know whether he was the father or somebody else was the father. So we are going to split the probability fifty-fifty between the two possibilities. We are going to load him with 50 percent of it and give the other percent to all the other men.

When calculating a statistical probability of paternity, the blood testing laboratory does not have before it any of the individualized non-genetic evidence, and it therefore uses a standard figure (.5) whenever it makes its calculations. This fact neither renders the methodology "scientifically invalid" nor does it deny appellant an opportunity to present the non-genetic evidence. If the laboratory's calculations meet the prerequisites for admissibility set forth in Section 5-1029(e)(1)(ii) the blood test evidence is admitted, but it is neither

conclusive nor does it create a presumption, it is merely one piece of evidence that is put before the jury. Appellant was free to, and in fact did, put on non-genetic evidence which not only disputed generally his paternity but, in effect, was an attack upon the use of the .5 prior probability figure. This allowed him an opportunity to counterbalance appellee's introduction of the blood test results and the prior probability on which they were based and served to protect his dues process rights.

We decline to respond to appellant's second contention, regarding the sufficiency of the reference population used in determining the paternity index, on the basis of Maryland Rule 1031 c 5 and this Court's holding in Van Meter v. State, 30 Md. App. 406 (1976). Nowhere in the record or in the briefs does appellant offer any argument in support

of his claim that the reference population used was inadequate. In his brief, appellant merely states:

> The record also raises a serious question about whether the "reference population" used by the Baltimore RH Laboratory, consisting in total of a mere 12,000 persons, is legally sufficient upon which to predicate the appellant's paternity index" of 460:1. Appellant respectfully submits that there is no legally sufficient evidence to support the assumption made by the Baltimore RH Laboratory that this data base is adequate to use with Bayes' Therem to extrapolate the statistical "plausibilities" made in this case, or that it is a proper "reference population" at all.

Yet, he offers no proof to support his conclusion. From this bald assertion, appellant leaps to the conclusion that his due process rights have been violated because of the size of the reference population used. Appellant, failing to include in his brief any argument to support his claim that the reference

population was insufficient, provides us with nothing to consider as a basis for his contention.[16]

Appellant does provide some argument on his right to a fair and impartial jury trial claim; however, we are not persuaded. He argues that the "statistical approach to the case distracted the jurors from weighing the evidence and determining the ultimate credibility of the plaintiff and defendant..." and that the jury "unquestionably was overwhelmed" by the testimony that the "plausibility" of the appellant's paternity was "99.78%", and therefore he was denied a right to a fair and impartial trial. The "statistical approach" to this case is no different from any other paternity case,

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[16] At oral argument, appellant's attorney said he would not "attack" the reference population used in this case and that he was willing to "stipulate that it is 'ok'."

and it is precisely what is required by the statute. The fact that the percentage obtained, 99.78%, may be perceived as "overwhelming" because of the extent to which it reaches 100% conclusiveness does not in any way prevent appellant from receiving a fair trial. The "statistical probability of paternity" required by the statute comprises only one part of the evidence that is put before the jury concerning the alleged father's probable paternity.[17] It is not the only evidence and it does not create an irrebuttable presumption of paternity. Appellant was allowed to put on evidence in support of his claim that he is not the child's

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[17] The court instructed the jury, in part, "You should give expert testimony the weight and value you believe it should have. You are not required to accept any expert's opinion. You should consider an expert's opinion together with all the other evidence."

father. All of the evidence went to the jury and there is no evidentiary support for his claim that the jurors improperly relied on the statistical probability as being dispositive of the issue.

II.

Hearsay

Appellant next argues that the court erred in excluding from evidence a hearsay statement in which another man, Larry Klouser, admitted sexual access to appellee during the crucial period of conception and idnicated that he could have been the father. Klouser had died sometime before trial. Although appellee admitted a close relationship with Klouser, she denied any sexual relations. Appellant's counsel proffered that Theresa Driscoll, who is appellant's sister and who was an acquaintance of both appellee and Klouser,

> will testify that Larry Klouser told her...that he had had a sexual relationship with the plaintiff in August of 1981 and stated...that he could have easily been the father or implied to her that he could have been the father and wanted to stay out of this controversy.

Kammer cited to the trial court and cites on appeal Aetna Casualty & Surety Co. v. Kuhl, 296 Md. 446 (1983) and Houck v. DeBonis, 38 Md. App. 85, cert. denied 282 Md. 734, U.S. cert. denied 434 U.S. 967 (1977), to support his contention that the Klouser statement as admissible under the declaration against interest hearsay exception. The trial court refused to read the two cases and stated:

> It is not admissible. It is pure hearsay. Absolute, clear hearsay. It is not admissible. It may affect the primary interest. That's something else, but as to the legitimacy of a child in a bastardy case... [i]t is entirely different. It is not admissible.

Aetna and Houck support appellant's position that Klouser's statement would

be a declaration against interest. The basic reasoning in those cases may, in succinct form, be summarized in the following statement from McCormick on Evidence at 819-820 (Cleary, 3rd Ed. 1984) concerning the two main requirements for satisfying the exception to the hearsay rule:

> [F]irst, the declaration must state facts which are against the pecuniary or proprietary interest of the declarant, or the making of the declaration itself must create evidence which could endanger his pocketbook if the statement were not true; second, the declarant must be unavailable at the time of trial. The first requirement has been believed to furnish the safeguard of special trustworthiness justifying most of the exceptions to the hearsay rule...The declarant...must... have had the opportunity to observe the facts, as witnesses must have. (Footnotes omitted.)

McCormick points out that if the first requirement is met, it furnishes "the safeguard of special trustworthiness

[which justifies] most of the exception to the hearsay rule." Id. at 819.

In State v. Standifur, 310 Md. 3 (1987), the Court was presented with the question of whether a declaration against the penal interest of an unavailable witness, offered by the State against the accused in a criminal trial, is sufficiently reliable to qualify under the common law exception to the hearsay rule and to satisfy the Confrontation Clauses of the Constitution of the United States and the Declaration of Rights of Maryland. Judge McAuliffe, writing for the Court, began his treatment of this question by noting that a declaration against penal interest is recognized in Maryland as an exception to the hearsay rule. 310 Md. at 9 (citations omitted). He also pointed out that it is similarly excepted by the Federal Rules of Evidence and by a majority of the states, and

quoted from Federal Rule of Evidence 804(b)(3) which provide:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
>
> * * *
>
> (3) Statement against interest. - A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

From this, Judge McAuliffe went on to consider the ramifications of inculpatory statement that implicate third persons. These "inculpatory statements of an accomplice no longer involved in the

criminal enterprise are inherently suspect and the particular circumstances surrounding the making of such statements must be carefully examined." 310 Md. at 15 (footnote omitted). As a result of the Court's careful analysis, the statement under analysis in Standifur was held to be not admissible.

In the case sub judice, we have an allegation that an unavailable third party (Klouser), made an inculpatory statement (that he could be the child's father) which was against his pecuniary interest. In determining whether this alleged hearsay statement should be admitted, we find Judge McAuliffe's discussion of whether a third party's statement qualifies as a declaration against penal interest instructive:

> In summary, a trial judge considering the admissibility of a hearsay staement offered as a declaration against penal interest must carefully con-

> sider the content of the statement in the light of all known and relevant circumstances surrounding the making of the statement and all relevant information concerning the declarant, and determine whether the statement was in fact against the declarant's penal interest and whether a reasonable person in the situation of the declarant would have perceived that it was against his penal interest at the time it was made. The trial judge should then consider whether there are present any other facts or circumstances, including those indicating a motive to falsify on the part of the declarant, that so cut against the presumption of reliability normally attending a declaration against interest that the statements should not be admitted. A statement against interest that survives this analysis, and those related statements so closely connected with it as to be equally trustworth, are admissible as declarations against interest.

310 Md. at 17. Judge McAuliffe's analysis closely tracks that contained in McCormick, supra, Section 279 at 824-27 concerning both civil and criminal cases, and in our opinion it is equally appli-

cable to cases, such as the one sub judice, where a statement is offered as a declaration against pecuniary interest.[18]

Applying the Standifur test to the facts of the case sub judice, we hold that the exclusion of the Klouser declaration, when considered "in the light of all known and relevant circumstances surrounding the making" of it and "all relevant information concerning" Klouser, was not an abuse of discretion. The proffered declaration of Klouser was made after appellant was named as the putative father, a fact which attenuates the conclusion that the statement was indeed against the declarant's interest. Once appellant had been named in the paternity suit, it was unlikely that Klouser would be accused of being the father and

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[18] Federal Rule 804(b)(3) specifically includes statements against pecuniary interest.

subjected to a paternity suit whose outcome could affect his pecuniary interest. Thus, at that point in time, he had little to lose.

Absent from the proffer were the relevant circumstances and information surrounding Klouser's making of the statement which are necessary to establish the required indicia of truthfulness. See generally Brenna v. State, 151 Md. 265 (1928) (statement by third person that he was the father of the child admitted as exception to general rule excluding such statements in paternity cases where testimony was to come from third party's sister, and where suicide note existed which stated that his suicide was brought about by the birth of the illegitimate child.) On the contrary, there was no evidence that would support the conclusion that Klouser indeed had sexual intercourse with

appellee during the period of conception. Such a relationship is denied by her and, in fact, she claims that Klouser was not interested in a sexual relationship with her because he was a homosexual. Thus, the only testimony in this regard is the proffer of appellant's sister. Although the fact that the witness was appellant's sister would affect credibility rather than admissibility, it is a fact that must be considered in applying the Standifur test. We hold that the evidence was insufficient to prove that the trial judge did abuse his discretion when he excluded the evidence.

III.

Jury Instructions

(a)

Kammer argues that the trial court's failure to explain the term "prima facie" to the jury constitutes prejudicial

error. We disagree.

After the trial court instructed the jury, the following colloquy took place:

> MR. BARNES (Appellant's attorney): The exceptions are twofold. I wanted you to explain one phrase that you used in the blood test. You said prima facie.
>
> THE COURT: What?
>
> MR. BARNES: You said prima facie.
>
> THE COURT: That is what I said. That's what it says in the statute.
>
> MR. BARNES: This is a legal phrase. I think you should tell them what is means. What it means in the lawyer's vernacular--
>
> THE COURT: You tell them in closing argument. All right with me.
>
> MR. BARNES: Will you instruct them prima facie -- what that means?
>
> THE COURT: Sure. I won't quarrel with that. You can explain it.
>
> MR. BARNES: But will you instruct them the definition of prima facie?

THE COURT: I might.

The trial court, however, did not instruct the jury on the meaning of prima facie. The trial court did instruct the jury that Section 5-1029(e)(2) stated that "a laboratory report is prima facie evidence o the result of a blood test".

Sections (b) and (e) of Rule 2-520, Instructions to the Jury, govern the disposition of this issue:

> (b) Written Requests. - The parties may file written requests for instructions at or before the close of the evidence and shall do so at any time fixed by the court.
>
> (e) Objections. - No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury.

The trial court properly asked the

parties for proposed instructions. Kammer must have been aware that the trial court would give an instruction based on Section 5-1029(e), and would include the term "prima facie", because of the centrality of that section to the issues. Kammer should have prepared either a written instruction, or orally proffered to the court a proposed definition. He did neither, and his "exception"[19] failed to provide the trial court with a proposed definition.

Under Rule 2-520(b), where a trial court fails or refuses to give an instruction on a specific issue, it is the responsibility of the party proposing the instruction to make a proper request, which includes submitting to the trial court the contents of the proposed

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[19] We note that under Rule 2-520(e) formal "exceptions" are no longer required.

instruction. Without this, the trial court need not act. In the case sub judice, the trial court was not presented with a proposed definition of the term "prima facie". There was not a proper request for the disputed instruction and we will therefore not address the issue. Md. Rule 1085.

In addition, under Rule 2-520(e) a party may not assign as error on appeal the failure to give an instruction unless there is a proper objection, which necessarily includes the stating of the grounds. Here, sections (b) and (e) of Rule 2-520 must be read together. Kammer's purported objection failed to state adequately the grounds for his objection, not because the trial court was unaware of the subject of the objection, but because Kammer failed to provide the court with a proposed instruction. Kammer, in his brief, very

cogently provides this Court with several definitions of the term "prima facie", but it was fatal not to have done so at trial.

(b)

Kammer also aruges that the trial court's failure to give the following instruction, based on Staley v. Staley, 25 Md. App. 99, cert. denied, 275 Md. 755 (1975), constituted prejudicial error:

> If you find the plaintiff in this case associated with another man, under suspicious circumstances, at or about the time of her pregnancy, you may consider this fact on the issue of paternity in this case.

In Staley, we held:

> [S]ince there was evidence of a relationship between the mother and her alleged paramour during the period of conception, the chancellor did not err in admitting evidence of possible misconduct occurring between them at times subsequent to the period of conception.

25 Md. App. at 108. Central to our ana-

lysis in Staley was the existence of competent evidence that both the husband of the plaintiff, and the alleged putative father, the paramour, had visited the plaintiff under "suspicious circumstances" at the time of conception. Explicit in the Staley analysis was the recognition that the proffered evidence, to be competent on the issue of the mothers' sexual relations with men other than the alleged father, must relate to the time of conception. Id. at 106-07.

Appellant asserts that the Staley instruction was required because of the testimony of Lois Kammer, Theresa Driscoll and the appellee. Lois Kammer is the wife of Kammer's brother and the sister of Klouser, the latter of whom, appellant alleges, had a relationship with appellee under "suspicious circumstances". Theresa Driscoll is Kammer's sister. Lois Kammer testified that she

knew her brother, Larry Klouser, was bisexual and that he and the appellee were close friends; also, that appellee spent the night with her brother sometime between 1979 and 1981. Theresa Driscoll testified that several times during the summer of 1981 Larry Klouser, appellee and herself went to the beach. All three were good friends. Appellee denied that she and Larry Klouser ever had sexual relationship but stated that Mr. Klouser was a confidant to whom she sometimes told her inner secrets. She also testified that Larry Klouser was a homosexual and that he was more like a "girlfriend" and admitted that she did visit his home alone on many occasions.

From this testimony, the trial court did not err when it refused to give a Staley based instruction. Under Maryland law, "a litigant is entitled to have his theory of the case presented to the jury,

but only if that theory of the case is a correct exposition of the law and there is testimony in the case which supports it." Sergeant Co. v. Pickett, 285 Md. 186, 194 (1979) (quoting Levine v. Rendler, 272 Md. 1, 13 (1974)). The evidence which speaks to "suspicious circumstances" at the time of conception in August of 1981, was: (1) the testimony of appellee that during 1981, she saw Klouser approximately once a week and was alone with him in Klouser's basement living quarters "on many occasions", and (2) the testimony of Lois Kammer that appellee and Klouser spent the night together in Klouser's basement, but she did not know "exactly when". Ms. Driscoll could state only that the frequent contact between appellee and Klouser occurred sometime "from 1979 to 1981". Appellee's denial of any sexual contact combined with Ms. Driscoll's ina-

bility to sufficiently narrow the period in which the alleged questionable conduct occurred, clearly distinguishes this testimony from that in Staley. We hold that the trial judge correctly concluded that this testimony, although relevant, did not meet the standard required to justify the requested instruction. Twining v. State, 234 Md. 97, 102-03 (1964) and cases cited therein.

JUDGMENT AFFIRMED;
COSTS TO BE PAID
BY APPELLANT.

APPENDIX

Bayes Theorem is expressed as follows:

$$P(F/M) = \frac{1}{(1-f) + (f/P(F))}$$

Where

$$f = \frac{P(M/\text{not-}F)}{P(M/F)}$$

And

P(F)	represents the prior probability
P(F/M)	represents the statistical probability of paternity
f	represents the quotient yielded when the random man's chance of fathering the child is divided by the accused's chance of fathering the child
P(M/not-F)	represents the random man's chance of fathering the child based upon the value calculated for each of the seven blood systems tested using a hypothetical blood type and the mother's blood type
P(M/F)	represents the accused's chance of fathering the child based upon the value calculated for each of the seven blood systems tested using his blood type and the mother's blood type

The values used in this case were:

P(M/not-F) = .001821

P(m/F) = .0838570

f = .00217155

The calculations made were:

$$P(f/M) = \frac{1}{(1-.00217155) + (.00217155/.5)}$$

$$= \frac{1}{.9978285} = .004343$$

$$= \frac{1}{1.0021715}$$

$$= .9978332 = 99.78\%$$

P(F/M) = 99.78%

MANDATE
Court of Special Appeals

No. 49, September Term, 1987

Thomas Robert Kammer
v.
Christine J. Young

JUDGMENT: January 13, 1988:
Opinion by Bishop, J.
Judgment affirmed, costs to be paid by appellant.

February 16, 1988:
Mandate issued.

State of Maryland, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this Sixteenth day of February, 1988.

s/Howard E. Friedman
Clerk of the Court
of Special Appeals

THOMAS ROBERT KAMMER * IN THE COURT

* OF APPEALS OF

v.

* MARYLAND

CHRISTINE J. YOUNG

* Petition Docket 2

*

* September Term, 1988

* (No. 49, September Term, 1987)

* Court of Special Appeals

****

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/Robert C. Murphy
Chief Judge

Date: May 31, 1988

IN THE COURT OF SPECIAL APPEALS
OF
MARYLAND

THOMAS ROBERT KAMMER	*	
Appellant	*	Number 49
v.	*	September Term, 1987
	*	
CHRISTINE J. YOUNG		73 Md.App. 565
	*	535 A.2d 936
Appellee		

****

NOTICE OF APPEAL

Take notice that, pursuant to the provisions of 28 U.S.C. Section 1257(2), an appeal has been entered by Thomas Robert Kammer to the Supreme Court of the United States of America from the judgment of this Court dated January 13, 1988 which affirmed the judgments of the Circuit Court for Baltimore City dated April 4, 1986 and May 7, 1986. The provisions of 28 U.S.C. Section 2403(b) may be applicable in this case.

BARNES AND RAINE, P.A.

_____

Clay M. Barnes

John E. Raine, III
405 W. Pennsylvania Avenue
Towson, Maryland 21204
(301) 321-0818

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the 12th day of August, 1988 a copy of the aforegoing Notice of Appeal was mailed, postage prepaid, or hand-delivered, to:

Alexander L. Cummings, Clerk
Court of Appeals of Maryland
Courts of Appeal Building
Rowe Boulevard and Taylor Avenue
Annapolis, Maryland 21401

Saundra E. Banks, Clerk
Circuit Court for Baltimore City
Room 462 - Court House East
111 N. Calvert Street
Baltimore, Maryland 21202
Case No. PD 44-77991

J. Joseph Curran, Jr.
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Attorney for Appellee

Clay M. Barnes

Baltimore RH Typing Laboratory
University Square
22 South Paca Street
Baltimore, Maryland 21201
(301) 539-4321

11/12/82

Domestic Relations Division
Baltimore City
Criminal Court Bldg., Room 419
Calvert and Fayette Streets
Baltimore, Maryland 21202

Re: Lab# 15083

Dear Sir/Madam:

Red cell and HLA Typings were performed on the following persons on 11/9/82:

RED CELL TYPINGS

Name	Grp	MNS2
Young, Christine J.	Al	MSs
Kammer, Thomas Robert	Al	MNSs
Young, John Thomas	Al	MNSs

Rh	K	fya	fyb	Jka
Rh1hr'+ (Cc D ee)	-	+	+	+
Rh1hr'- (Cc D ee)	-	-	+	-
Rh1hr'- (Cc D ee)	-	-	+	+

HLA TYPINGS

Name	HLA Typing
Young, Christine J.	A-02,AW19,B-27, BW44, CW01,CW05
Kammer, Thomas Robert	A-03,A-29,B-15,B---, CW03,C---
Young, John Thomas	A-02,A-03,B-15,BW44, CW03,CW05

On the basis of these tests, Kammer, Thomas Robert, cannot be excluded as the father of Young, John Thomas.

PATERNITY INDEX= 460 to 1

PLAUSIBILITY OF PATERNITY= 99.78%

A bill for $345.00 will be forthcoming.

Yours truly,

Robert E. Wenk, M.D.

REW

OKMB
11/15/82

cc: Clay M. Barnes, Attorney
405 W. Pennsylvania Avenue
Towson, Maryland 21204

No. 88-320

Supreme Court, U.S.
FILED
OCT 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS ROBERT KAMMER,

Appellant,

v.

CHRISTINE J. YOUNG,

Appellee.

ON APPEAL FROM THE
COURT OF SPECIAL APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

J. JOSEPH CURRAN, JR.,
Attorney General of Maryland,

JOSEPH B. SPILLMAN,*
Assistant Attorney General,

Saratoga State Center,
Suite 1015,
311 West Saratoga Street,
Baltimore, Maryland 21201,
(301) 333-0019,

Attorneys for Appellee.

* *Counsel of Record*

QUESTION PRESENTED

The question presented by this Motion to Dismiss or Affirm is whether appellant fails to present a substantial federal question in his attack on the introduction in a paternity case of blood test results, where the uncontradicted evidence established that the tests were accurately conducted by qualified experts meeting state statutory prerequisites for admissibility.

PARTIES TO THE PROCEEDING BELOW

The parties have remained the same since this action was filed in the Circuit Court for Baltimore City, Maryland. Defendant/Appellant is Thomas Robert Kammer. Plaintiff/Appellee is Christine J. Young.

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No. 88-320

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THOMAS ROBERT KAMMER,

Appellant,

v.

CHRISTINE J. YOUNG,

Appellee.

ON APPEAL FROM THE
COURT OF SPECIAL APPEALS OF MARYLAND

MOTION TO DISMISS OF AFFIRM

Pursuant to Rule 16.1, appellee moves to dismiss the appeal herein, or in the alternative, to affirm the decision of the Court of Special Appeals of Maryland. The grounds for the motion are that appellant's constitutional arguments are frivolous and

this appeal fails to present a substantial federal question. Therefore, appellant is not entitled to review by this Court under 28 U.S.C. §1257. Were this Court to treat this appeal as a petition for a writ of certiorari, the petition should be denied for the reasons stated in this motion.

STATE STATUTE INVOLVED

This appeal raises the question of the constitutionality, as applied in this case, of Maryland Code Annotated, Family Law Article, §5-1029, which pertains to the admission of paternity blood test results.

STATEMENT OF THE CASE

The Statement of the Case presented in the Jurisdictional Statement is both argumentative and incomplete. The pertinent facts are set forth accurately in the published Opinion of the Court of

Special Appeals of Maryland. See, Kammer v. Young, 73 Md. App. 565, 535 A.2d 936, 937-940 cert. denied, 312 Md. 602, 541 A.2d 964 (1988); Appendix to Jurisdictional Statement at 56-64.

ARGUMENT

This Court Should Dismiss The Appeal Herein, Or In The Alternative, Affirm The Judgment Below Because Appellant Fails To Present A Substantial Federal Question.

Appellant does not present any valid reasons in support of his bare allegation that he was deprived of rights under the Fifth and Fourteenth Amendments to the United States Constitution. Contrary to the inference raised by appellant, see Jurisdictional Statement at 22 and 24-28, he was not prevented from introducing any evidence, including his own expert, both to

challenge the blood test report and explain its significance to the jury. [1]

Furthermore, this is not a case in which a jury was given an "inflammatory or highly prejudicial presentation" of the results of paternity testing. J.S. at 25. Appellee's case was not based on genetic evidence alone, but on credible non-genetic evidence tending to prove his

---

1 The central focus of appellant's attack is the use of a .5 "prior probability" in the blood test equation. However, the jury understood that it was not bound by this working assumption. Indeed, Dr. Chase, appellant's expert, calculated various probability figures using a range of "prior probabilities." This is precisely the approach recommended by Ellman and Kaye in the law review article upon which appellant relies exclusively for his position. 54 N.Y.U. L.Rev. 1131 (1979). This 1979 analysis has since become outdated as the courts, legislatures and the scientific community have refined the appropriate role for genetic testing in paternity disputes. See, e.g., American Association of Blood Banks, Inclusion Probabilities in Parentage Testing, (Robert H. Walker, Ed., 1983); see generally 37 A.L.R.4th 167 (1982).

paternity. As the Court of Special Appeals of Maryland concluded:

> The "statistical probability of paternity" required by the statute comprises only one part of the evidence that is put before the jury concerning the alleged father's probable paternity. It is not the only evidence and it does not create an irrebuttable presumption of paternity. Appellant was allowed to put on evidence in support of his claim that he is not the child's father. All of the evidence went to the jury and there is no evidentiary support for his claim that the jurors improperly relied on the statistical probability as being dispositive of the issue. (footnote omitted)

Kammer v. Young, supra 73 Md. App. at 575, 535 A.2d at 942; Apx. 76-77.

To merit review by this Court, an appeal must raise a substantial federal question. Rule 16.1(b) and (c); see e.g., Hicks v. Miranda, 422 U.S. 332, 344 (1974). This appeal does not. Appellant simply alleges that introduction of blood test results in this case resulted in a deprivation of his rights. Without providing any analysis or pertinent

authority, appellant offers only his bald claim of constitutional deprivation. Contrary to appellant's position, valid genetic testing, when adequately explained to a jury, is admissible. E.g., Walker, Inclusion Probabilities in Parentage Testing, supra; Kolko, "Admissibility of HLA Results to Determine Paternity," 9 Family Law Reporter 4009 (1983); see generally, Commonwealth v. Beausoleil, 490 N.E.2d 788 (Mass. 1986). No substantial federal question is presented by the facts of this case and the decision of the Maryland courts is obviously correct. Thus, further review is unwarranted.

CONCLUSION

Therefore, for the reasons stated, appellee moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment of the Court of Special

Appeals of Maryland. Treating appellant's papers as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

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